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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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Pierce County Cause No.: 10-3-01083-1
Court of Appeals No.: 47643-6-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

KARA L. UNDERWOOD, n.k.a. KARA L. CUTLER,
Appellee,

v.

ROBERT E. UNDERWOOD,
Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JAMES R. ORLANDO

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ORIGINAL

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INTRODUCTION

Ms. Cutler seems to assert that the court should draw a negative inference from Mr. Underwood's changes of counsel. The court should be mindful that Mr. Underwood is a Lieutenant Colonel in the U.S. Army and he was stationed in Naples, Italy, when his wife packed up their two teen daughters, and moved to Washington where she filed for a dissolution of marriage in 2010. This followed Mr. Underwood's expressing his displeasure at discovering that she was engaged in another extramarital affair. This was the second extramarital affair he had discovered since 2005. Mr. Underwood went directly from Naples, Italy, to being deployed to Afghanistan. He received a very brief stay of proceedings under SCRA, during which time his visits with his children were suspended at a hearing which he could not attend and where he was unrepresented.¹ Mr. Underwood had different attorneys because he hired counsel to represent him while overseas. The first attorney was directed to object to jurisdiction because Mr. Underwood was a lifelong resident of Montana. When Mr. Underwood received the transcripts of the hearing and realized Mr. Clement did not object, Mr. Underwood did not have faith that Mr. Clement was following his instructions. Mr. Underwood then represented himself in a SCRA 50 U.S.C. app. Section 521 hearing and asked for and

¹ This violation of due process was held by the court of appeals in the first appeal to have occurred, but, to not have prejudiced Mr. Underwood.

received a “stay”. Mr. Underwood had to hire Andrea Donovan while deployed in Afghanistan when the stay was violated and the court removed his rights to see his two daughters while he was on his two week leave period during his 13 month deployment. (RP 435 from Appeal 44068-7)Ms. Donovan spent a year preparing for the divorce trial and was gathering all the evidence needed to present at trial. However, roughly 4 weeks before his divorce trial, Ms Cutler, who conspired with an acquaintance of Mr. Underwood, one Serena Kiptoo, lodged false allegations against Mr. Underwood. (RP212, 216-219)He found himself facing a serious criminal charge, he needed a criminal defense lawyer and he couldn’t afford two lawyers. At that point, he hired Philip Thornton, who is known for his experience in defending criminal matters. Mr. Underwood, had to post bail (nonrefundable fee of \$20,000), had to pay a criminal defense attorney, continue working to pay child support and spousal maintenance, but, was confined to quarters pending investigation for three months. (RP 598, Appeal 44068-7) Following an investigation by the Pierce County Prosecutor, and roughly a week before his criminal case was to proceed, and approximately two weeks before his divorce case did proceed, all criminal charges against him were dropped. But, the prejudice to his ability to prepare his divorce had already manifested. He was ill prepared to suddenly try a divorce case, he was lacking in money

due to borrowing to pay bail and for criminal defense, and the court would not give him a further continuance. Mr. Underwood was disadvantaged throughout his entire case by logistics due to being on active duty, and later due to restrictions placed upon him as a result of false criminal accusations initiated by Ms. Cutler. At trial, Mr. Underwood was further disadvantaged when he discovered that his wife intended to relocate their children to a new state without providing prior notice.² After the letter Decision was issued, Mr. Thornton withdrew. Mr. Underwood then hired separate counsel to address his appeal. No other inference should be made regarding Mr. Underwood's change of counsel except the prejudice suffered by an active duty military soldier has been recognized by Congress in enacting SCRA, and that even with such protections, the soldier can be disadvantaged in legal proceedings initiated in his absence.

ARGUMENT IN REPLY

1) The trial court failed to follow the remand of the court of appeals as a result of receiving misdirection from the respondent regarding the scope of the remand.

² The court of appeals held that allowing both children to relocate without advance notice to Mr. Underwood did violate the relocation act based upon the findings reported. Even in light of the court's amended findings, the court failed to specify findings which would support the relocation of the children without notice to Mr. Underwood, but the issue is moot and Mr. Underwood is not appealing that issue due to mootness (both children are emancipated).

The court of appeals held that the trial court abused its discretion in its calculation of the community lien due to inclusion of improper evidence surrounding the outcome of prior litigation in which the parties were involved. *Marriage of Underwood*, 181 Wn. App. 608, 614 (Wash. Ct. App. 2014).(page 29 of Decision). It was clear from the trial court findings that the trial court was heavily influenced by the failed property transaction in making its final property division. Specifically the trial court findings stated:

“This dissolution has some unique property issues. The Underwoods believed that they were purchasing ten acres from his grandparents in Montana. This was believed to be part of the Underwood Ranch property. They executed an agreement to buy the property at a price of \$275 per month, which was roughly the amount of the grandmother’s medication costs. They paid on it for a number of years and when they attempted to get deeds to the property from the trustees, they discovered no deed existed. They initiated litigation and the case settled with the trust dissolving. Robert received a 1/6 interest of \$2,100,000 or close to \$350,000.00 They also were compensated over \$14,000 for payments made and they recovered some attorney fees. Kara has testified that the ten acres would have been worth \$85,000 to \$130,000 had the transaction been completed. Instead of the community recovering the value of the property it lost, Robert received the \$350,000 as his separate property.” (CP 476)

The entire letter decision was incorporated by reference into the court’s findings of fact and conclusions of law. On appeal, the court of appeals stated:

We hold that the trial court abused its discretion when it imposed the lien in Kara's favor based in part on evidence of the projected lost profits from the parties' failed property transaction. We reverse and remand to the trial court to vacate this lien, and to recalculate the value of the lien against Robert's property without considering projected lost profits from the failed property transaction. We affirm on all other property distribution issues.

Marriage of Underwood, 181 Wn. App. 608, 614 (Wash. Ct. App. 2014).

The court further stated:

“We vacate the \$112,000 lien because it was based in part on the trial court's incorrect reliance on the failed Montana property deal.”

Marriage of Underwood, 181 Wn.App. 608, 614 (2014)

The Court of Appeals further instructed:

“We also direct the trial court to remove this lien from the property records. Because it is unclear what portion (if any) of the lien related to the failed property transaction and because the trial court also based its decision to award the lien on the community nature of the properties and the community efforts used to finance and maintain the properties, we remand to the trial court to recalculate the amount of Kara's lien without consideration of the projected lost profits from the failed Montana property deal.”

Marriage of Underwood, 181 Wn.App. 608, 614 (page 31 of Decision) (2014)

On Remand, the trial court interpreted the remand instructions of the court of appeals as follows:

“In terms of the lien on the property, I don't know how the Court of Appeals made a determination in some sense that I relied upon lost profits. That was a very, very small portion of my letter ruling. It referenced that Kara Underwood testified as to what she

believed profits from that property would be. I didn't include that. I didn't make that my ruling. I didn't include that in the findings or the decree. I think it's just pure speculation that was the basis for my ruling."

(April 17, 2015, RP 32.)

The trial court erred in assuming that the court of appeals was asking for amended findings to justify the same result as this was not what the court of appeals directed. The court of appeals held that the trial court abused its discretion by admitting and relying upon improper evidence in calculation of the community lien that formed the basis for a final property distribution. *Marriage of Underwood*, 181 Wn.App. 608, 614 (page 31 of Decision) (2014). The respondent seems to completely skip the step taken by the court of appeals in making the determination that the trial court *did abuse its discretion*, and instead spends significant time arguing that a trial court should rarely be overturned on appeal. The court of appeals did not question whether the trial court abused its discretion in admitting the improper evidence, in referencing the improper evidence as a bases for its property decision in the letter decision specifically with regard to the lien on Robert's separate property. The finding and instruction by the court of appeals was clear. The trial court admitted much improper evidence in the form of "sour grapes" concerning litigation that occurred in 2005. The trial court cited specifically to that improper evidence in its letter decision

and in its findings, and improperly awarded the bulk of equity in Mr. Underwood's separate property to Ms. Cutler in the form of a community lien. The lien calculation, to the extent it relied upon the improper evidence was held to be error and an abuse of discretion pursuant to *Marriage of Kasesurg*, 126 Wn. App. 546 (2005).

The respondent should not be permitted to request that the trial court amend its findings to reach a result that was already held to be an abuse of discretion by the court of appeals. Yet, this is what the respondent did, and the trial court adopted this sidestepping action to reach the same result. Because the trial court has heard so much improper evidence, and the trial court is essentially ignoring the remand of the court of appeals to recalculate the lien, this matter should be remanded to a new judge to consider the findings already made and to fairly calculate the value of the community lien, if any.

It is significant that the trial court fails to outline its lien calculation based upon the findings already made, and while mathematic precision may not be required in making a final property division, the calculation of a community lien must be based upon direct and positive evidence of community contribution. Thus a calculation of that contribution must be made to support the finding of a community lien. *Hamlin v. Merlino*, 44 Wn. 2d 851, 857-58 (1954); *In re Marriage of*

Harshman, 18 Wn. App. 116, 125-126 (1977). The calculation must consider whether in imposing a lien, the property appreciated or depreciated in value. *Lucker v. Lucker*, 71 Wn. 2d 165 (1967). *Marriage of Elam*, 97 Wn.2d 811, 816 (1982). A community lien also may be offset by other equitable principles, such as benefits to the community in use of separate property, including fair rental value for property lived in by the community. *Marriage of Miracle*, 101 Wn.2d 137, 139 (1984). None of the above bases for calculation of a community lien were employed by the trial court on remand. Instead, the trial court simply denied that its previous findings formed a basis for imposing a community lien. Then, the trial court did not outline which specific findings were considered in place of the previous findings while imposing such a significant community lien against Robert's separate property.

Respondent argues that the "trial court has gone on record and clarified its ruling that lost profits were not considered in its ruling," and she further offers that she "never pled or argued (that issue) at trial," (page 5, Response Brief of Respondent (mistitled Reply Brief). Yet the record is replete with improper evidence offered by Ms. Cutler, which was objected to. The improper evidence surrounds the value of land sold at the time the prior litigation was settled, and was offered specifically by Ms. Cutler, including the so called possible value of the land at trial, which values

were specifically repeated and referenced by the trial court in its letter decision. (RP 73-75 from Court of Appeals Case #44068-7.) Mr. Underwood's attorney (Philip Thornton) certainly tried to outline reasons why the court should not consider such evidence in his closing argument standing out as an issue that needed to be rebutted. RP 771-774 (from Court of Appeals Case #44068-7.) Yet, the trial court's original findings spoke loudly that such evidence was considered when the court stated: "Instead of the community recovering the value of the property it lost, Robert received the \$350,000.00 as his separate property." CP 476

Given that the trial court found the value of this separate property depreciated from \$350,000.00 to a little over \$191,000.00 at trial, then awarded 58% of the equity in Mr. Underwood's separate property to Ms. Cutler, it is impossible to justify such a significant community lien without considering the improper evidence as a matter of law and from a point of fairness and equity. This miscalculation must have occurred because the court's other findings set the community contribution at much lower amounts, and was done in the absence of applying the improper evidence considered by the court. It is also clear that the community lien imposed by the court included zero depreciation in value and must have been calculated to have appreciated, given that the ratio of community to separate property in 2005 was \$350,000 separate and a little over \$56,000

community (\$14,000 from the settlement +\$42,000.00 from sale of the family home) in 2005 and the court's calculation at trial was very different. RP 476. The only other specific figure supporting a lien was improvements allegedly in the amount of \$27,998.00, even though this alleged contribution did not translate into any profit to Mr. Underwood.

To argue that the respondent did not ask the court to consider the lost value of the failed Montana property deal is misleading. By presenting and offering evidence and trial testimony it is clear from the trial court's letter decision that it was *heavily* influenced by this evidence in making its overall property distribution and the court of appeals further held that such decision was an abuse of discretion. The court of appeals determination to reverse the value of the community lien was appropriate under the circumstances.

The court of appeals stated in the concluding portion of its decision:

"We also reverse the trial court's lien in Kara's favor insofar as the lien amount relates to evidence of the failed 2005 Montana property deal and we remand for recalculation of the lien, if any, without consideration of this evidence."

Marriage of Underwood decision, Conclusion

The respondent now seems to suggest that the community interest in Robert's separate property cannot be traced, and argues

instead that the award was simply fair. Yet, the court findings specifically traced the acquisition of community and separate property and the specific basis for the community lien in its original findings (e.g. \$14,000.00 from the litigation, \$42,000.00 from the sale of a home and \$27,998.54 in materials for improvements). (CP 476) It should be remembered that the property acquired by Robert in 2005 was not acquired through purchase, but through 1031 exchange of trust property for other property, meaning that the acquisition costs could not have been commingled- the property from the trust was exchanged for the property acquired. (RP 59)

The findings set forth a basis for community contribution, but even if these figures are added together, they do not form the basis for a \$112,000.00 lien against separate property which was worth \$350,000.00 in 2005, but had depreciated to \$193,000.00 by the time of trial. Yet, the community investment seems to have appreciated significantly for no particular reason. And again, why is it fair for Robert to receive no portion of the community lien interest?

In addition to paying spousal support, paying half of his retirement, paying child support, and Ms. Cutler being awarded more than half the equity of Mr. Underwood's separate property,

Mr. Underwood was also ordered to pay Ms. Cutler's attorney's fees and debt accumulated by her during separation. (CP 469-479). Because Mr. Underwood's monthly salary was depleted by nearly half by spousal support and child support, and he had no savings, his only means of paying Ms. Underwood was out of the equity in property he was awarded.

Mr. Underwood was not trying to "sell the property out from under" Ms. Cutler, and he expected that she would receive much of the proceeds due to the fee judgments he owed. He was surprised that Ms. Cutler demanded \$217,677.13 (CP 306) to pay off the judgments owed, even though the court of appeals vacated the community lien in its decision. *Marriage of Underwood*, 181 Wn.App. 608, 614 (page 31 of Decision) (2014). It was obvious Ms. Cutler included the vacated lien, plus interest, plus the original fee awards, plus the court of appeals fee award, even though that had not yet been reduced to judgment, in blocking sale of the property. Mr. Underwood wished to pay off the judgments against him by selling property after the first appeal expecting that the lien would be recalculated and he would be able to afford to pay Ms. Cutler and still have some value left. Ms. Cutler's demand for \$217,677.13 resulted in the loss of the sale and continued litigation. (CP 306) Mr. Underwood has paid most of his financial obligations to Ms. Cutler (all

spousal support and child support) except for the community lien award and some of the fee awards. Mr. Underwood also asserts he transferred his children's property, and though Ms. Cutler has argued otherwise, there has been no further action by her in this regard other than making accusations. Mr. Underwood even offered to deed the Washington property to Ms. Cutler in satisfaction of the lien in the motion before the court, to which the court stated, "I can't order that she accept the property in lieu of the lien amount plus interest." May 1, 2015 RP 11.

It is unfair for Ms. Cutler to assert in lieu of this that Mr. Underwood was doing anything *except* attempting to satisfy the obligations imposed upon him by the court and move forward with his life. Ms. Cutler's decision to try to cause the sale of the property to fail makes sense during a time when most banks pay less than 1% interest and Ms. Cutler is demanding 12% monthly interest on the fee judgments. Once again, how is financially destroying one party in a divorce a "fair and equitable" result? We are not re-litigating that aspect. All Mr. Underwood is litigating is the fact that there is no "direct and positive evidence" in the court's findings that support the \$112,000.00 lien and the trial court did not follow the court of appeals remand instructions. There was no calculation of "direct and positive evidence" in the original trial court findings, and there is none on remand.

2) Rather than recalculate the community lien, the trial court errs by denying its earlier findings of fact, even as this was pointed out to the trial court.

The trial court heard much improper evidence and it is clear that evidence colored the court's view of Mr. Underwood and the underlying property decision. However, the error claimed in this appeal is that the trial court on remand now denies making the original findings which formed the basis for the reversal and remand. This is also error. The court of appeals remand was surely not to allow the trial court to simply excise entire paragraphs of its original findings, and then deny making those findings on remand. It was error for the trial court to find the court of appeals' reliance on the trial court's earlier findings to be "pure speculation" in ordering remand.

Ms. Cutler also attempts to prejudice this court from making a decision based upon fairness and equity by inserting allegations against Mr. Underwood allegedly sending emails which criticize the legal system and lawyers generally. Mr. Underwood objects to this evidence as hearsay, as inauthentic, irrelevant and highly prejudicial. ER 801, ER 901, ER 403. Hopefully the court of

appeals will not consider such prejudicial content which is completely irrelevant to the calculation of a community lien.

What is clear is that Mr. Underwood has come to court to seek justice. He litigated much of his case from overseas and suffered many prejudices along the way while trying to defend false criminal allegations so close to the litigation of his divorce matter. Ms. Cutler benefited from these prejudices, which were deliberately initiated in part by her and these “Rambo-like” tactics have prolonged the litigation resulting in necessary appeals for justice.

Mr. Underwood incurred costs and fees of over \$45,000.00 defending the false criminal accusations initiated by Ms. Cutler. In addition, this court held previously that the court employed an improper definition of domestic violence against Mr. Underwood but sustained the finding based upon other evidence in the record. Much of the other evidence asserted and relied on by the court of appeals as also false and Mr. Underwood submitted proof of this falsity to the trial court for the court’s information on remand. (CP 276) If intransigence is at issue, it is due to Ms. Cutler’s tactics.

Specifically, in 2005, Mr. Underwood was accused by Ms. Cutler of hitting her car with his car in a prior divorce proceeding filed by her. Mr. Underwood provided a picture to the court of his

vehicle, wherein the right rear wheel well of his truck was dented- demonstrating it was impossible for him to have hit the moving truck as the side of his vehicle was struck with the front of her vehicle (CP 414-415). Mr. Underwood was cleared of all wrong doing by the prosecuting Attorney's office in Spokane, WA and they dismissed the charges. The appeals court used these false statements of the incident made by Ms Cutler during the trial, as evidence to support the courts issuing a the permanent restraining order against Mr. Underwood and taking his guns rights away permanently, even though this was previously litigated. Mr. Underwood now cannot possess a firearm based upon these false allegations, and due to the misrepresented facts, he cannot find work in law enforcement or any other position that requires a background security clearance despite his otherwise unblemished 30 year military career as an Army Officer.

3) Mr. Underwood asks that any community lien be based upon direct and positive evidence, not based upon a "general property distribution" as the caselaw does not support a lien on this basis.

Ms. Cutler continually asserts that the trial court imposed the lien, not relying upon specific evidence set forth in the

findings, but, to “do equity.” In determining the equities of a case, the court is instructed by proper, admissible evidence, and should not be subjected to considering improper, prejudicial evidence. Thus, it is inequitable and unjust for a court to reconsider court proceedings which occurred ten years earlier in determining what may be fair and equitable today, as that would be an improper relitigation of matters previously settled by a court. *Marriage of Kasesurg*, 126 Wn. App. 546, 108 P.3d 1278 (2005). It is improper for the court to consider “expectancies” such as the possible outcome of a potential tort claim, when making a determination of what is fair and equitable. *Marriage of Bishop*, 46 Wn.App.198, 203 (1986). And, in imposing a community lien against separate property, the court is supposed to calculate the lien based upon direct and positive evidence of community contribution. It should not be based upon some general idea of how to divide available property. *In re Marshall*, 86 Wn. App. 878, 881-882 (Wash. Ct. App. 1997).

Thus, under Washington law, it would be unfair and inequitable to award 58% of a person’s separate property in a marriage where the community contribution is closer to 15% without evidence of some other basis. In such instances, the court’s

decision to award a person the other side's separate property is typically justified by specific findings supporting such an award. But the court specifically declined to award Ms. Cutler Mr. Underwood's separate property in lieu of the community lien. May 1, 2015 RP 11.

In this case, after consideration of improper evidence, which was held to be an abuse of discretion, the court imposed a community lien against separate property. The lien calculation was never outlined, even on remand, despite the court's instruction to "recalculate" the lien. This is a marriage that didn't even last twenty years, that came after both parties had children from other relationships, wherein the wife was awarded 58% of the available equity of the husband's inherited separate property and 50% portion of his retirement. Ms. Cutler is currently receiving her portion of the retirement presently (should have been since August, 2015 when Mr. Underwood retired), and to say otherwise is untrue.

How is it equitable for Ms. Cutler to walk away from a marriage that didn't last 20 years with the bulk of Mr. Underwood's inheritance? How is it justifiable to argue that Mr. Underwood's inheritance was somehow spent by the community while the community interest in his separate property simultaneously

appreciated in value even though the overall value of the inheritance actually depreciated? To do equity, the community lien should have represented specific community contribution, which is what the case law requires. These questions are not “minute details” but are based upon decades of cases which define the equity behind establishment of a community lien in terms of reimbursement, protecting and defining community and separate property. The trial court on remand did not show its calculations, and did not base the community lien on the direct and positive evidence presented of community contribution. How is it equitable to Mr. Underwood, or the future Underwood heirs, to take away the bulk of his inheritance, without showing any evidentiary basis? This was error within the meaning of the cases, within the meaning of equity and within the context of the court of appeals remand.

The respondent is not being forthright with the court regarding the assets she obtained in the dissolution of marriage. She has had complete access to all assets during separation, as Mr. Underwood was stationed first in Italy, then deployed to Afghanistan, then came to Washington more than a full year after petitioner filed her petition for dissolution of marriage. She had

access to personal property in the United States for over a year prior to Mr. Underwood coming to Washington State.

In addition, the respondent has received over \$105,000.00 in spousal support, exclusive of child support, half of the appellant's retainer/retirement pay, multiple fee awards and Mr. Underwood was to pay much of the separate debt incurred by Ms. Cutler after filing for dissolution. Mr. Underwood was also awarded over \$40,000.00 of debt (debt to Casey Jeszenka and Jeanette Underwood Hallam) he incurred trying to defend the false allegations lodged against him by Ms. Cutler, which were later dismissed. (CP 474)

Despite the award of crushing debt to be paid from roughly half his salary, and as Mr. Underwood's appellate brief makes clear, he simply requested that the community lien to be imposed be calculated on "direct and positive evidence" of community contribution, and not based upon the improper evidence submitted by Ms. Cutler at trial.

4) Ms. Cutler fails to address how the community lien could have appreciated while Mr. Underwood's separate property depreciated.

Ms. Cutler asserts that real property fluctuates in value, and that she provided the trial court with values at trial. This is true, as Mr. Underwood, in battling the false criminal allegations against him, was unable to present much evidence of anything at the divorce trial.

However, based upon the values presented by Ms. Cutler at trial, it was clear that the investments made into the real property by Mr. Underwood in 2005 were much higher than the value of that same property at trial. This is the depreciation which was not addressed by the court at trial in its calculation of the lien, or for that matter, on remand. Ms. Cutler fails to address how the overall property values of all investments made in 2005 depreciated from the time of acquisition of property to trial, yet the community investment allegedly made into the same property managed to significantly appreciate.

It is clear in *Marriage of Elam*, 97 Wn. 2d 811, 816 (1982), that when property appreciates due to community efforts, the community contribution should appreciate as well. Likewise, if the investment depreciates in value, the community investment should also depreciate. *Lucker v. Lucker*, 71 Wn.2d 165 (1967). It is not fair or equitable to allow the community to improve the other spouse out of their separate property. Yet, this is exactly what has occurred here.

Ms. Cutler seems fond of referencing irrelevant evidence in making her arguments; her suggestion that some possible claim by Mr. Underwood for allegations of malpractice in future litigation represents an award to him that could be considered by the court. The court cannot base an award in a dissolution of marriage on an expectancy, just like they

cannot impose a community lien based upon a general property distribution. *Marriage of Bishop*, 46 Wn.App.198, 203 (1986).

5) The court of appeals mandate was clear, the community lien imposed by the trial court was vacated. There was no basis for an award of interest.

Ms. Cutler seems to be improperly asking the court of appeals to revise its prior ruling and prior vacation of the community lien. When a judgment or lien is vacated, it is no longer a liquidated sum. *Dep't of Corr. v. Fluor Daniel, Inc.*, 160 Wn.2d 786 (Wash. 2007). There was no basis to impose interest once the court of appeals vacated the lien. The trial court erred in trying to deny the basis for the remand and in ignoring the court of appeals direction to recalculate the community lien.

There is no evidence in the record that Mr. Underwood is “using the court system to stall his payment.” Mr. Underwood appealed several rulings of the trial court, many of which rulings were held to be improper. It is unfair for Ms. Cutler to blame Mr. Underwood for appealing an unfair ruling that was held to be an abuse of discretion when she is the party who submitted improper evidence. Moreover, given that Mr. Underwood had no savings, was paying half of his net income to Ms. Cutler, and that the property with the most significant equity was 100% lienied such that he could not even borrow to pay what he was ordered, he simply did not have the options cited to by the respondent to pay her.

6) There is no basis for award of fees on appeal as Mr. Underwood's financial position is much changed and has deteriorated while Ms. Cutler's financial positions has improved.

Ms. Cutler should not be awarded fees on appeal. Ms. Cutler was previously awarded fees based upon RCW 26.09.140 in 2010. Since 2010, Mr. Underwood's financial position is much deteriorated as a result of suffering disability from his service in the military. Ms. Cutler's financial position is much improved, she has both a job and income from investments as well as income from Mr. Underwood's military retirement that wasn't listed on her financial declaration. The court has not made any findings of intransigence against Mr. Underwood, and the court findings make it clear that it was impossible for Mr. Underwood to comply with all the court orders given that he had no savings, was ordered to pay spousal maintenance, any attempt at selling assets to pay obligations was blocked by Ms. Cutler's inflated demands to the title company. The entry of a restraining order against Mr. Underwood resulted in the loss of his "Top Secret" security clearance and his ability to possess a firearm, significantly narrowing any possible job opportunities he may have had on retirement from the military, despite a relatively unblemished military career. Mr. Underwood is now retired as of August, 2015 and underwent neurosurgery in October. He is unable to work at this time and lives off his portion of

his fixed retirement income in Montana. She also receives her portion of Mr. Underwood's Army retirement/retainer pay. Mr. Underwood's appeal is not frivolous; the trial court outright denied entering findings upon which the court of appeals based its remand then disregarding specific instructions (to vacate the lien) of the Court of Appeals and added interest on the award from the date of entry of the dissolution despite the very clear instruction to vacate the lien and remove it from the records. The court of appeals instructions told the trial court to recalculate the lien based *only* upon the proper evidence. The trial court did not recalculate the lien at all, and instead amended findings to avoid calculating the lien. This was error.

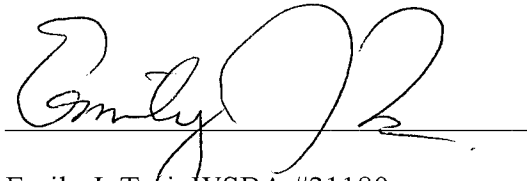
CONCLUSION

Mr. Underwood respectfully requests that the court of appeals remand this matter to a different judge for calculation of a community lien based only on the direct and positive evidence (community sums contributed) of community contribution, without regard to improper evidence regarding equity. Mr. Underwood requests that the court of appeals vacate any interest on the community lien as an unliquidated sum, since the trial court relied on improper evidence in determining the amount of the lien, but failed to recalculate the lien pursuant to the appellate court's instructions. Finally, the calculation of any community

lien must consider the depreciation of the value of the property between the time of the contribution and the date of trial.

Respectfully submitted this 4th day of January, 2016.

TSAI LAW COMPANY, PLLC

A handwritten signature in black ink, appearing to read "Emily J. Tsai", is written over a horizontal line.

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

That on January 4, 2016, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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Dated at Seattle, Washington this 4 day of January, 2016.

Melissa Perez
Melissa Perez
Legal Assistant to Emily Tsai

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